Timothy J. Bernasek, WSBA No. 43604
Email: tbernasek@dunncarney.com
John R. Barhoum, WSBA No. 42776
Email: jbarhoum@dunncarney.com
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
Telephone: 503-224-6440
Fax: 503-224-7324

Attorneys for Defendants Western Range Association

Honorable Rosanna M. Peterson

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

ELVIS RUIZ FRANCISCO JAVIER, CASTRO and EDUARDO MARTINEZ, Plaintiffs, v. MAX FERNANDEZ and ANN FERNANDEZ, a Marital community; and WESTERN RANGE ASSOCIATION, a foreign nonprofit organization, Defendants.	Case No. 2:11-cv-03088-RMP DEFENDANT WESTERN RANGE ASSOCIATION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is a wage case involving agricultural workers from Chile. Plaintiffs Elvis Ruiz, Francisco Javier Castro, and Eduardo Martinez ("Plaintiffs") are Chilean citizens. In 2007, they applied for and obtained H-2A visas to work as sheepherders in the United States. *See* Complaint, Dkt. 1, ¶1. The H-2A visa program allows

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

foreign workers to temporarily work in the United States, subject to regulations promulgated by the U.S. Department of Labor ("USDOL").

Western Range Association ("WRA"), a non-profit organization, was created by agricultural employers to help employers and foreign workers successfully navigate the intricacies of the H-2A program. *See* Complaint, Dkt. 1, ¶11.

Plaintiffs contacted WRA's Chilean representative to apply for H-2A visas. *See* Deposition of Elvis Ruiz ("Ruiz Depo."), pg. 17; Deposition of Francisco Javier Castro ("Castro Depo."), pgs. 61-62; Deposition of Eduardo Martinez ("Martinez Depo."), pg. 47 (Exhibits 1 through 3 to the Declaration of Timothy J. Bernasek ("Bernasek Decl."). WRA helped Plaintiffs obtain their H-2A visas and coordinated their transportation to the United States. Plaintiffs subsequently went to work as sheepherders for various ranchers, including co-defendant Max Fernandez ("Fernandez") from 2007-2010.

Plaintiffs entered into written employment agreements with Fernandez, wherein Fernandez, pursuant to the H-2A regulations, agreed to pay them no less $750 per month. They were also given three meals a day, free housing, and worker's compensation coverage.

Fernandez supervised and managed Plaintiffs' work on the ranch. *See* Castro Depo., pgs. 63-66; Martinez Depo., pgs. 46-48; Ruiz Depo., pgs. 38-40. He dictated the manner and method by which their work was done. He also controlled their work schedule, housing arrangements, monetary compensation, and other work conditions. *Id.* Simply put, Plaintiffs were on the ranch to work for Fernandez as his employees.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

Id.

Plaintiffs quit working for Fernandez in 2010. They alleged that Fernandez required them to do non-sheepherding work on occasion, such as cutting the grass and/or chopping firewood. Plaintiffs, therefore, claimed that they were entitled to minimum wage under the Fair Labor Standards Act ("FLSA").

The USDOL investigated Plaintiffs' allegations and found them to be wholly without merit. *See* USDOL Report, Ex. 4 to Bernasek Decl. Undeterred, Plaintiffs filed this lawsuit against Fernandez and WRA, alleging violations of the FLSA, state wage laws, and breach of contract.

Plaintiffs' specific claims against WRA involve the FLSA, Washington state wage laws, breach of employment contracts, and quantum meruit. Each claim fails for one specific reason: *WRA was not Plaintiffs' employer*. The record is undisputed that Fernandez — not WRA — controlled Plaintiffs and served as their employer. WRA simply helped Plaintiffs apply for and obtain their H2-A visas. Accordingly, WRA is entitled to judgment as a matter of law.

II. POINTS AND AUTHORITIES

A. Summary Judgment Standard.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are *designed to secure the just, speedy and inexpensive determination of every action*." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (emphasis added).

Summary judgment is appropriate when "the pleadings, depositions, answers

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A factual dispute is "genuine" if the evidence would allow a reasonable juror to return a verdict for the non-moving party. *Id.* The mere existence of a "scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on *which a jury could reasonably find for the plaintiff*." *Id.* (emphasis added).

Here, Plaintiffs, to survive summary judgment, must offer evidence that WRA was their employer. They cannot. Accordingly, summary judgment is required.

B. WRA is Not a Joint Employer under the FLSA or State Law.

Plaintiffs, to succeed on their FLSA and state wage claims, must prove that WRA was a joint-employer. Without such a showing, the claims must be dismissed on summary judgment.

Whether or not a party was a joint-employer under the FLSA or state law wage claims presents a question of law for the Court. *See Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). The question is governed by the economic realities test. *See Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983). That test examines the totality of the circumstances and the economic reality of the situation, considering a non-exhaustive list of factors. *See Moreau v. Air Fr.*, 356 F.3d 942, 946-48 (9th Cir. 2004); *Anfinson v. FedEx Ground,* 159 Wn. App. 35, 50, 244 P.3d 32 (2010) (using FLSA economic realities test to analyze Washington state wage claims).

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

The relevant factors considered by the Court include: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the method of payment of the workers; (4) the right, directly or indirectly, to hire, fire or modify the employment condition of the workers; (5) preparation of payroll and the payment of wages; and (6) whether the premises and equipment of the employer are used for the work. *Id.*

No single factor is determinative. The Court must consider all relevant factors in a particular situation to determine whether a joint employment relationship exists. *See Torres-Lopez,* 111 F.3d at 639.

Here, Plaintiffs cannot meet their burden to prove that WRA was a joint-employer under the applicable test—and it is not even close. The record is undisputed that WRA, a non-profit organization, merely facilitated Plaintiffs' H2-A visa applications. Plaintiffs went to work as sheepherders for Fernandez. Fernandez was their boss. He controlled their work conditions. He controlled their schedules. He controlled their method of payment. He controlled the manner and method by which their work was done. WRA did none of these things. These facts are undisputed and they require judgment as a matter of law in favor of WRA.

1. WRA exercised no control over Plaintiffs.

The first factor needs little discussion. The record is undisputed that WRA exercised no control whatsoever over Plaintiffs' work at the Fernandez ranch. To wit, each Plaintiff testified unequivocally that Fernandez — not WRA — controlled their work at the ranch. *See* Castro Depo., pgs. 63-66; Martinez Depo., pgs. 46-48;

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
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851 SW Sixth Avenue, Suite 1500
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503.224.6440 / Fax: 503.224.7324

Ruiz Depo., pgs. 38-40.

The USDOL agrees. The USDOL, after investigating Plaintiffs' allegations, found that "[o]nce they arrive at the ranch, WRA doesn't have any control over the workers, all duties and assignments are made by the rancher." *See* USDOL Report, pg. 3.

It is difficult, if not impossible, to imagine a scenario where a defendant can be found to be a joint-employer where it exercised no control whatsoever over the plaintiff. That is the case we have here. WRA played no role in Plaintiffs' work at the ranch. Plaintiffs worked for Fernandez. Accordingly, this factor weighs heavily in favor of WRA.

2. WRA did not supervise Plaintiffs' work.

This factor also requires little discussion. WRA never supervised Plaintiffs' work at anytime while at the Fernandez ranch. Again, each Plaintiff testified that WRA never stepped foot on the Fernandez Ranch — much less supervised their work. *See* Castro Depo., pgs. 66; Martinez Depo., pgs. 48; Ruiz Depo., pgs. 40. Plaintiffs each testified that Fernandez supervised their work. Accordingly, this factor also ways heavily in favor of WRA.

3. WRA did not control the rate or method of pay.

This factor also weighs heavily in WRA's favor. WRA has no control over the rate of pay or method of payment. The USDOL, as part of its Special Procedures for

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DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

sheepherders under the H-2A program, determines the pay rates for the workers.[1] Moreover, each Plaintiff testified that Fernandez controlled the method of payment. *See* Castro Depo., pg. 66; Martinez Depo., pg. 47-48; Ruiz Depo., pg. 40.

4. The right to hire, fire, or modify the employment conditions of the workers.

WRA obtains workers for its members under the H-2A program. Accordingly, WRA has the ability to modify the employment conditions of a worker only if it finds the member is not complying with H-2A program requirements or if the worker or employer requests a transfer. *See* Deposition of Dennis Richins, pgs. 88-90, 168-170, Ex. 5 to Bernasek Decl. To the extent WRA has any ability to modify employment conditions, it can only be done to the extent provided under H-2A regulations. *Id.* There is simply no evidence in the record to prove, or even suggest, WRA ever attempted to fire or otherwise alter Plaintiffs' work conditions.

Importantly, the USDOL addressed this factor in its investigation of Fernandez by concluding, "WRA and the USDOL are responsible for *setting up* the employment conditions for receiving and employing the H-2A workers and once they are assigned to a rancher the rancher is then responsible for the (sic) hiring and firing the Workers." *See* USDOL Report, pg. 3. (emphasis added).

Fernandez directly controls the employment conditions of the workers. To the extent WRA is even indirectly responsible for these conditions, it is only as required

[1] Section 6 of the "Special Procedures Labor Certification Process For Sheepherders And Goatherders Under The H-2A Program provides that the workers are to be paid the highest of the prevailing wage rate, the adverse effect wage rate, or the federal/state minimum wage. In 2010/2011 the rate was $750 a month in Washington.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
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851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

under the H-2A program.

5. Preparation of payroll and payment of wages.

This factor also supports WRA's position. WRA never prepared payroll or payment information. Again, each Plaintiff testified that they were paid by Fernandez—not WRA. *See* Castro Depo., pg. 66; Martinez Depo., pg. 47-48; Ruiz Depo., pg. 40. There is no evidence in the record to suggest otherwise.

Also, the USDOL, addressing this issue, concluded that: "Fernandez makes all the decisions involving pay rates above the specified amount, pay dates, transportation, and hiring and firing, as well as completing the workers payroll." *See* USDOL Report, pg. 3.

6. WRA's premises and equipment were never used.

The final relevant factor to consider is whether WRA's equipment and/or premises were used by Plaintiffs. They were not. WRA is a non-profit organization with its principal office in Utah. Plaintiffs worked at the Fernandez ranch in Washington, and they used his equipment. *See* Castro Depo., pg. 66; Martinez Depo., pg. 47-48; Ruiz Depo., pg. 40. Again, this factor weighs heavily in WRA's favor.

7. Summary of the factors.

While the typical joint-employer case requires a careful balancing of facts that fall on both sides of the analysis, such balancing is not necessary in this case. There are no facts that prove, or even suggest, that WRA was a joint-employer. Each factor favors WRA.

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Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

The record is clear that Fernandez was Plaintiffs' employer. He told them what work to perform. He supervised their work. He controlled the method of payment. He controlled their work schedule. All work was performed on his ranch. In fact, each Plaintiff testified that they never spoke to or saw any WRA representative while they worked for Fernandez. There is simply no evidence to support Plaintiffs' claims. Accordingly, they must be dismissed.

C. Plaintiffs' Breach of Contract Claims Fails as a Matter of Law.

Plaintiffs allege vaguely that "Defendants entered into employment contracts" with them. See Complaint, ¶67. Plaintiffs further allege that these purported employment contracts were breached by violating the FLSA and state wage laws. Plaintiffs are wrong.

WRA and Plaintiffs are not parties to any employment contracts. Rather, Plaintiffs and Fernandez are parties to certain employment contracts. Thus, the claim fails for that simple reason.

The claim fails for an additional reason. As discussed above, because WRA did not exercise the type of control necessary to bring it within the scope of the FLSA or state wage claims, it could not have violated those statutes as a matter of law. Thus, even assuming WRA is subject to some purported employment contract, the contract was not breached. Accordingly, summary judgment is required.

D. Plaintiffs' *Quantum Meruit* Claim Fails as a Matter of Law.

As demonstrated above, there is no joint employment relationship between WRA and Plaintiffs. As such, Plaintiffs' claim for recovery under the doctrine of

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Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

quantum meruit similarly fails.

Quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact. *Young v. Young*, 164 Wash. 2d 477, 485, 191 P.3d 1258, 1262 (2008). "[T]he elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." *Id.*

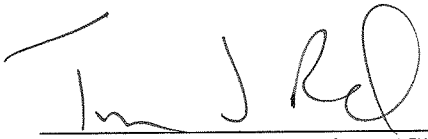
Here, the record is undisputed that Fernandez requested the work performed by Plaintiffs — not WRA. WRA never requested that Plaintiffs perform any of the work completed for Fernandez. Thus, their claim fails as a matter of law.

III. CONCLUSION

Based on the foregoing, all of Plaintiffs' claims against WRA fail as a matter of law and should be dismissed.

Dated: December 3, 2012.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP



Timothy J. Bernasek, WSBA No. 43604
Email: tbernasek@dunncarney.com
John R. Barhoum, WSBA No. 42776
Email: jbarhoum@dunncarney.com
Attorneys for Defendant Western Range Association

Trial Attorney: Timothy J. Bernasek
WSBA No. 43604

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system and caused it to be served by mail to the following:

Michele Besso	:	micheleb@nwjustice.org
Weeun Wang	:	wwang@farmworkerjustice.org
Gary E. Lofland	:	glofland@glofland.net
John Jay Carroll	:	jcarroll@vhlegal.com

Dated: December 3, 2012.

DUNN CARNEY ALLEN HIGGINS & TONGUE LLP

Timothy J. Bernasek, WSBA No. 43604
Email: tbernasek@dunncarney.com
John R. Barhoum, WSBA No. 42776
Email: jbarhoum@dunncarney.com
Attorneys for Defendant Western Range Association

Trial Attorney: Timothy J. Bernasek
WSBA No. 43604

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Attorneys at Law
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204-1357
503.224.6440 / Fax: 503.224.7324